The Law Office of
Brown & Brown, P.C.
Estate, Trust, Tax and Long Term Care Planning

www.brownandbrownpc.com
1250 E. Sherwood Drive
Grand Junction, Colorado 81501
Phone: (970) 243-8250 ♦ Fax: (970) 241-1144

Baird B. Brown **Clara Brown Shaffer** **Shauna C. Clemmer** **Daniel F. Fitzgerald**

"Accumulating wealth is one thing. Preserving it is another.
Let our family help yours."

Special Report

Wills v. Trusts

We are often asked whether a person should use a will or a trust to pass their estate to their heirs upon their death. It is a question each of us should ask ourselves. The bottom line is that, in most cases, the answer is not clear but is a matter of choice. To understand the difference, we must first look at the difference between a probate and a non-probate asset.

Probate Assets

A probate asset is an asset that passes when a person dies through a court process commonly referred to as probate. Probate usually takes about six months; a personal representative is appointed to handle the proceeding; creditors, if any, file claims in the proceeding; and ultimately, the assets of the probate proceeding are distributed to the individuals named in the will of the decedent. If the decedent did not leave a will the assets pass in accordance with a statute of the state in which the decedent lives on the date of the decedent's death. Dying without a will is commonly referred to as dying intestate.

There are advantages to having your assets pass through the probate process before being distributed to your heirs. The primary advantage is there can be court supervision. A court can help a personal representative sort through many issues that may arise during the administration of the estate including, but certainly not limited to, disputes amongst heirs, the nature and specifics of distributions, the validity of claims of creditors and many other matters in which a personal representative may simply need guidance.

The primary disadvantages of probate are that it can be somewhat more time consuming, usually adds cost to the administration of the estate (although not significant), can require administration in more than one state if an individual owns assets in more than one state, gives a forum or platform in which heirs can fight, requires a direct notice to known creditors and will usually require the disclosure of the decedent's estate plan to the public. Many clients simply want the privacy of a trust (in contrast to the will type of an estate plan) as disclosure to the public of the nature and timing of distributions to the decedent's heirs is not required. The fact your heir (often times children) might receive a distribution on their 20th or 30th birthday might be important to keep private.

Non-Probate Assets

Non-probate assets are those that pass to your designated heirs without the need of court administration or probate. Most clients already own non-probate assets. Non-probate assets include those such as retirement accounts, assets titled in joint tenancy and insurance. A non-probate asset passes directly to the intended beneficiary under a life insurance or annuity policy and a joint tenancy asset passes to the surviving joint tenant. For those individuals with a will estate plan it is important they coordinate how their estate will pass with both the probate and non-probate assets.

For example, let's look at life insurance. Let's assume a parent of three children names the surviving children (those living at the time of the parent's death), as the beneficiary of a life insurance policy on the parent's life. Let's also assume the parent's will leaves all of the parent's assets to the children equally and if one of the children predeceases the parent, the deceased child's share would then pass to the children of the deceased child, (the grandchildren). Under the above scenario, if a child dies prior to the parent, the probate assets are still divided equally among each of the children with an equal share passing to the children of the deceased child. The proceeds of the life insurance policy will pass to the surviving two children and not to the children of the deceased child, because the insurance policy requires the proceeds be paid to the "surviving" children.

Will Estate Plan

With a will estate plan, it cannot be emphasized enough how important it is to coordinate the assets passing pursuant to the will with those that pass outside the will. As we will see below the same holds true (the need to coordinate the ownership of assets as well as the beneficiaries named in non-probate holdings) for the use of a trust type of estate plan.

Trust Estate Plan

A trust estate plan is a process whereby the probate assets are essentially converted into non-probate assets. The type of trust we are referring to is commonly known as a "revocable," "living", "inter-vivos" or "loving" trust. We simply refer to them as "prepaid probate." The trust instrument sets forth the distribution plan of the estate. Upon the death of the person creating the trust (i.e. the Settlor) the successor trustee of the trust administers the trust, much like a personal representative who administers a probate estate, and then distributes the trust assets in accordance with the trust terms.

Under most circumstances, the terms of a trust remain private upon the death of the Settlor and the trustee then in charge of administering the trust distributes the assets of the trust or continues to hold the assets in trust for a stated purpose. As with a will, a trust continuing beyond the death of the Settlor can be incorporated into the distribution provisions of the trust.

The advantages of the trust are numerous. All of the assets titled in the name of the trust are non-probate assets and are not subject to the jurisdiction of the probate court. The provisions of the trust (which the Settlor may not want known to the public) usually can be kept free from public view and potential intervention. Where assets are in multiple states, the trust can be administered across state lines without the need for multiple court proceedings. If the Settlor becomes incapacitated, it is often easier for the successor trustee to handle the Settlor's financial affairs as a successor trustee rather than as an agent under a power of attorney (a document usually relied on to help the testator of a will). Lastly, there usually is not a need to commence a probate proceeding.

The disadvantage of a trust is it usually takes more work (resulting in a higher cost) to set up your estate plan. It requires monitoring by you as the Settlor and the Trustee to insure it is kept up to date (as does a will) and insuring all your property is constantly within the trust can be burdensome if you are not inclined to keep your house in order. Trusts and wills do not save estate taxes in and of themselves.

How to Decide Which Type of Plan?

So how does one decide the type of plan to use? We advise clients that there usually is no right or wrong decision. If a client owns property in multiple states subject to multiple probates or wishes to keep their plan of distribution from the public eye then I usually recommend a trust estate plan. If on the other hand, a client would rather not spend as much now on their estate plan or are not inclined to keep their assets titled into a trust, then we will recommend a will.

Within either a will or trust estate plan, tax savings planning can be utilized. At least in our office the cost to create a trust or a will (other than a simple will) is essentially the same. The only difference is that with a trust additional time is needed to "fund" the trust. Funding of the trust involves the re-titling of assets which can be anywhere from an hour or two to many hours of our time and cost to the client.

Each client is a bit different, and their specific facts and goals need to be taken into consideration. At our office, we find that an estimated 60% of the estate plans we create are trust estate plans. The rest of our clients choose a will estate plan.